U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 28 July 2003

Case No.: 2003-AIR-22

In the Matter of

JOHN A. ROBINSON
Complainant

v.

NORTHWEST AIRLINES, INC.
Respondent

DECISION AND ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

This case arises under the employee protective provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. §42121, *et seq.*, Public Law 106-181, Title V §519. Respondent has filed a Motion for Summary Judgment with 23 exhibits attached, and pro se Complainant has responded with 8 attachments to his reply.

Background

1. Respondent's Exhibit 17 is a June 3, 2002, letter from OSHA apprising Respondent that on May 3, 2002, Complainant had filed with that office a complaint under the AIR 21 Act alleging that on March 21, 2002, Respondent prohibited Complainant from the benefit of using his jump seat privileges on the flight deck of any of Respondent's aircraft. This action was taken, based upon Complainant's allegations, because Complainant had made written safety concerns to the FAA and verbal safety concerns to Respondent's management. (Complainant's actual complaint was not attached to this notice, but only summarized.)

2. Respondent's Exhibit 18 is a July 24, 2002, letter from OSHA apprising Respondent that Complainant had "amended" his complaint to include the following

adverse actions on Respondent's part: (1) required Complainant to undergo psychiatric and psychological examinations on February 14, 2002 and (2) changing Complainant's status of employment on April 4, 2002, to long term sick leave all because of Complainant's safety complaints. (Complainant's actual "amendment" was not attached to this notice, but only summarized.)[1]

3. By letter dated March 24, 2003, OSHA determined that Complainant had expressed safety concerns involving unescorted passenger baggage on aircraft and an unsafe lock on the baggage room door, both of which Respondent was aware. However, the letter determined that no retaliatory action was taken by Respondent regarding these concerns. Specifically, OSHA determined Respondent, in accordance with the union contract, required a psychiatric evaluation and that the decision of jump seat privileges and removal to non-active status on long term sick leave was the result of the psychiatric evaluation of February 14, 2002.

4. By letter dated March 28, 2003, Complainant appealed that determination, and the matter was referred to the Office of Administrative Law Judges where it is now set for formal hearing on August 26, 2003.

5. On May 20, 2003, Respondent filed a Motion for Summary Judgment. Complainant replied, but sought, and was granted, additional time up to and through July 23, 2003, to conduct discovery and further respond to Respondent's motion. That time has now passed with no additional response from Complainant.

Timeliness of Amended Complaint

Respondent urges that the allegations of adverse actions contained in Complainant's July 2002, "amendment" to his complaint are untimely because they complain of actions taken by Respondent more than 90 days from the filing date of his amendment. I do not agree.

According to OSHA's summary, all of Complainant's allegations of adverse actions concern actions taken by Respondent within the 90 day period prior to the filing of his May 3, 2002, complaint. While I have never seen either Complainant's initial

[1]Complainant maintains in his reply that he presented all these issues to OSHA investigator Margaret Wolfe on May 3, 2002.

complaint or the "amendment," even if Complainant did not initially refer to the psychiatric evaluation of February 14, 2002, or his change in status on April 4, 2002, I do not find him barred from including by amendment these issues to his original complaint. These were not discrete or unconnected acts. They all arose from Complainant's fitness evaluation and occurred within 90 days of his May 3, 2002, complaint.

According to 29 C.F.R. §1979.103(d) of the Air 21 implementing regulations, the complaint is to be filed "within 90 days after an alleged violation of the Act occurs." Section 103(b) of these regulations states that "no particular form of complaint is required." Likewise 29 C.F.R. §18.2, the practice and procedure rules of the Office of Administrative Law Judges under which these cases are conducted (29 C.F.R. §1979.107(a)), defines a "complaint" as "any document initiating an adjudicatory proceeding. . . ." In other words, notice pleadings are sufficient. Specificity is not a requirement. In this instance, Complainant was pro se and within 90 days of what he felt to be adverse actions taken against him, he filed a timely complaint which he says embodied all the actions taken against him. Two months later, while still in the investigative stage, OSHA, however, says it was provided information of other adverse actions taken against Complainant within the 90 day period that preceded his May 3, 2002, complaint. Regardless of when OSHA found out, all actions were rooted in the results of the psychological evaluation.[2]

Lastly, as far as Respondent's reliance upon the Supreme Court's decision in *National Railroad Passenger Corporation v. Abner Morgan, Jr.*, 122 S.Ct 2061 (2002), I find it to be misplaced. Had the allegations of adverse action taken by Respondent occurred after the filing of Complainant's May 3, 2002, complaint or had they occurred more than 90 days prior to the filing of Complainant's May 3, 2002, complaint, perhaps the case would be applicable. Here, however, all alleged adverse actions fell within 90 days of Complainant's May 3, 2002, complaint, and his complaint at that time was sufficient to timely encompass all of the related events of that period. Consequently, as to Respondent's Motion for Summary Judgment as it concerns timeliness of the issues raised by Complainant's "amended" complaint, the same is DENIED.

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[2] In response to OSHA's notice of the amendment, Respondent's counsel responded that Respondent's response to the initial complaint "amply demonstrates that the new allegations are also absurd" because Respondent had the right to require a psychiatric evaluation. (RX 19).

Failure to Make a Prima Facie Case

Respondent next urges that Respondent's actions do not constitute unfavorable personnel actions. As to the ban on jump seat privileges, Respondent points out this did not deny Complainant the privilege of pass flying, but simply relegated Complainant to the passenger section of the aircraft. In support of this position, Respondent offered as Exhibit 22 of its Motion an affidavit from Chief Pilot Balliet who explains the jump seat is classified for extra crew members use only and an inactive pilot on medical leave is not allowed the seating privilege since he would be unable to assist the crew in an emergency situation. He also states that this restriction had no affect on Complainant's flying privileges or that of his family.

As to the medical examination, Respondent argues that Section 15(b) of the pilot's agreement (RX 1) authorizes Respondent to require psychiatric evaluation when a pilot's fitness is in question. In this instance, Respondent alleges that it was it's concern over Complainant's conduct with FAA personnel in September 2000 (RX 2), Complainant's behavior at an October 25, 2000, arbitration hearing (RX 3), Complainant's letter to Osama Bin Laden dated July 6, 2001 (RX 4) and Complainant trapping himself in a Detroit bag storage room (RX 5) which led to Respondent requiring a psychiatric examination (RX 6). As an alleged result of that examination Respondent argues that it concluded on April 9, 2002, with a letter from John Nelson to Complainant, that based on Dr. O'Connor's evaluation and opinion that Complainant was unfit to fly effective April 4, 2002, and was placed on sick leave (RX 16).

On June 3, 2003, Complainant, who is unrepresented, filed a lengthy response to Respondent's motion with 8 exhibits attached, and while given additional time to supplement the response no further response was received.

In defense of Respondent's Motion for Summary Judgment, Complainant states that in the year 2000 he advised Respondent of his desire to continue flying as a flight engineer after his 60th birthday (January 30, 2002), and that he had been assigned to a training class in February 2002. However, Complainant maintains that because of numerous safety concerns on his part, made both to Respondent and FAA, that he was retaliated against by Respondent and required to undergo a "non-contractual" psychological evaluation. In support thereof, Complainant alleges that he holds an FAA medical certificate and that is all that is required of a pilot. He also points to a

union grievance now pending before an arbitrator as a result of his required evaluation. (CX F).

As to Respondent's alleged reasons that led up to his psychiatric evaluation, Complainant points out that the FAA dispute occurred in the year 2000, and that he flew two more years without Respondent exhibiting concern over that incident. Likewise, as to the 2000 arbitration he said that arose over his need for medical treatment following a monkey bite, and the postscript to Bin Laden in a June 24, 2001, letter expressing safety concerns, was done in jest. Finally, as to the December 2001 incident in the crew baggage room, Complainant states the lock broke and that he was allowed to continue to fly thereafter.

In summary, Complainant urges that he has no medical impairment, he possesses a FAA medical certificate and that he continued flying after each of the alleged concerns expressed by Respondent. Consequently, it is Complainant's position that he was retaliated against for expressing numerous safety concerns, including failure to remove unaccompanied baggage (RX 4) and secure the crew baggage room.

A summary decision is appropriate only where there is no genuine issue as to any material fact; otherwise, the case is to be set for an evidentiary hearing. 29 C.F.R. §18.40. In this instance, I find that Complainant's response of June 3, 2003, sufficiently sets forth specific facts showing that there are genuine issues of facts for hearing.

Respondent alleges, without providing me with a copy of his report, that Dr. O'Connor found Complainant to be unfit to fly. Respondent further alleges, without supplying evidence from anyone in a management position, that Respondent had various and sufficient concerns over Complainant's behavior sufficient to require him to undergo a psychological evaluation. Except for the affidavit of Captain Balliet that the loss of jump seat privileges was routine when a pilot is on medical leave, Respondent offered no other evidence to support its allegations that Complainant suffered no unfavorable personnel action. Complainant, on the other hand, introduces the fact that he wanted to continue flying after his 60th birthday and not only lost this privilege and flying privileges, but sick and vacation leave as well.

Finally, Respondent alleges, without affidavits, what while it was aware of Complainant's June 25, 2001, letter to FAA (RX 4) that there is nothing to connect

Complainant's safety concerns with his fitness evaluation or sick leave status. Complainant, on the other hand, responds that he continued flying after that time and likewise continued making safety complaints, including the baggage room episode, which culminated with his being required to undergo a fitness evaluation, the actual results of which have not been revealed.

Conclusion

Respondent's motion alleges occurrences over a two year period that prompted the perceived need for Complainant to undergo a fitness evaluation. However, the only evidence concerning Respondent's decision is a January 16, 2002, letter from Captain John Balliet advising Complainant that because of the baggage room incident Respondent was exercising its 15(b) right to have him evaluated. (RX 6). For purposes of a summary judgment, however, Complainant has sufficiently turned this issue into a disputed fact by stating the motivation was not because of his behavior over the past two years while he was allowed to continue flying, but instead an effort on Respondent's part to discontinue his employment because of his safety concerns rather than allow him to continue to fly after his 60th birthday as a flight engineer. Likewise, as to what prompted Respondent to restrict Complainant's flying privileges as well as change his status to sick leave and remove him from flying, while alleged in the motion to be Dr. O'Connor's opinion, this too is supported only by a letter advising Complainant of the action, but with no offer made of Dr. O'Connor's actual assessment. (RX 8 & 16). Again, Complainant places this fact in dispute stating that he has the required FAA medical approval and the results of his evaluation was misused to remove him from active duty because of his safety concerns.

In sum, that these parties are covered under the Act is of no dispute. Also, the fact Complainant made at least one safety concern about unaccompanied baggage, which was known to Respondent, appears to be undisputed. (RX 4). Also, and despite Respondent's accusations to the contrary, it appears that an adverse action befell Complainant in that he had a change in employment status. As regards the Motion for Summary Judgment, however, what I find to be in dispute is what prompted Complainant's change in status? Was it legitimate due to the evaluation of Dr. O'Connor or was that reason pre-textural? In this regard, Respondent has failed to provide sufficient evidence to support the allegations it makes in its Motion for Summary Judgment, and I find Complainant's response sufficiently fact specific for

purposes of a summary decision to demonstrate there exists genuine issues of facts for an evidentiary hearing.[3]

ORDER

IT IS HEREBY ORDERED that the Respondent's Motion for Summary Judgment is **DENIED**. The matter shall proceed to formal hearing on August 26, 2003.

So ORDERED this 28th day of July, 2003, at Metairie, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

CRA:kw

[3]While I acknowledge that properly made airline decisions regarding flight safety are entitled deference, in a case of this nature allegations alone are insufficient to achieve a summary judgment.